In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 1221

JOSEPH CATALDO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioner and five co-defendants [1] were convicted on three counts of receiving and selling securities in interstate commerce, in violation of 18 U.S.C. 2314, and 2315, and conspiracy to commit this offense. Petitioner was sentenced to concurrent terms of four years' imprisonment. The court of appeals affirmed, 433 F. 2d 38 (Pet. App. 1a–7a).

[1] One co-defendant, Lucas, has filed a separate petition for a writ of certiorari, to which the government has filed its memorandum in opposition, No. 6212, this Term.

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The factual setting is stated by the court below (Pet. App. 2a–3a). On November 15, 1967, securities worth slightly less than a half million dollars were stolen from the Los Angeles office of a brokerage firm. They were sent to Miami and from there mailed to co-defendant Segal in New York. Efforts by petitioner and his co-defendants to dispose of the securities culminated in petitioner's directing co-defendant Halikas to sell them through a New York firm. This firm, unknown to petitioner and his co-defendants, was a correspondent of the California firm; it recognized the California firm name, and investigated and discovered that the securities had been stolen.

Upon this discovery, the F.B.I. was notified. It then sought Halikas in order to arrest him. Agents went to an apartment in New York City shared by Halikas and one Costas. With Costas' consent, they entered the apartment (including Halikas' bedroom) on two successive days, looking for Halikas; he was not there on either occasion. However, the agents observed in plain view on Halikas' dresser certain documents which related to this offense. They then obtained a search warrant, returned to the apartment, and seized the documents. During the trial the defendants sought to suppress the evidence thus obtained. The trial judge conducted a hearing, at the conclusion of which he ruled that the motion to suppress was untimely but that in any event the search was proper.

Petitioner's chief contention here, as in the court below, is that the search of Halikas' apartment was unlawful and therefore the evidence thus seized should have been suppressed. The assertion of unlawfulness

is without merit, and in any event petitioner lacks standing to object.

The agents entered Halikas' apartment on the first two occasions with the consent of Costas, his roommate. This consent was entirely sufficient to justify the agents' entry and examination on these occasions. See *Frazier* v. *Cupp*, 394 U.S. 731, 740; *Warden* v. *Hayden*, 387 U.S. 294, 297; *Wright* v. *United States*, 389 F. 2d 996, 998–999, (C.A. 8); *Drummond* v. *United States*, 350 F. 2d 983, 987–988 (C.A. 8), certiorari denied *sub nom. Castaldi* v. *United States*, 384 U.S. 944. The agents' observation of the incriminating documents, which were in plain view, did not constitute a further search. See *Harris* v. *United States*, 390 U.S. 234; *Ker* v. *California*, 374 U.S. 23, 42–43; *Shorey* v. *Warden*, 401 F. 2d 474, 478 (C.A. 4). And the documents were seized only after the agents obtained a search warrant. The court below correctly concluded (Pet. App. 4a–5a) on these facts that the search and seizure were proper.

In any event, petitioner cannot, under *Alderman* v. *United States*, 394 U.S. 165, object to this search and seizure.[2] Petitioner had no interest in the apartment, which was occupied only by Halikas and Costas; nor did he have a protected interest in the documents. Since petitioner's rights were in no way violated by the search, he is not entitled to prevent the admis-

[2] The standing question thus presented was not before the trial court, since there the objections to the admission of the evidence seized were originally made by Halikas, who plainly could raise this matter. The trial court overruled all objections and thus did not differentiate among the various defendants.

sion against him of the evidence thus seized. See also *Simmons* v. *United States,* 390 U.S. 377, 389–390; *Wong Sun* v. *United States,* 371 U.S. 471, 491–492; *Jones* v. *United States,* 362 U.S. 257, 261.

The other questions raised by the petition do not warrant review by this Court. The sufficiency of evidence challenge (Pet. 21) was not made in the court below and does not merit consideration here. The assertion regarding Segal's purported post-trial statement, in which he recanted his trial testimony and absolved petitioner of responsibility (Pet. 22), was presented to the court below only on rehearing. In any event, this is a mater of little moment, since at the trial petitioner and his co-defendants attacked Segal's testimony and the trial court carefully admonished the jury to consider that testimony with care (Pet. App. 6a). The jury resolved the issue thus posed adversely to petitioner and his companions. The post-trial statement, even if true, adds nothing significant to the earlier attack on Segal's credibility.

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1971.

U.S. GOVERNMENT PRINTING OFFICE: 1971